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United States Circuit Court of Appeals

For the Ninth Circuit

GLEN FULKERSON, Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge

Brief of the United States

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STATEMENT OF THE CASE

The testimony shows that certain government agents visited the premises mentioned. Upon going in the hall they were met by a woman named Miller.

She invited them in and they asked for a drink of Scotch and a drink of gin. The gin was brought in a glass and the Scotch was brought in a bottle. They were served and one of the agents asked the defendant Miller what she would take for the bottle, and told her that they would give her five dollars for what was left in the bottle and the drink they had consumed. She told them she did not know but would find out. She left the room, and in a moment the defendant Fulkerson came into the room and said "Five is all right," handing them the bottle and taking the five-dollar bill. The defendant Miller did not return, but she was found in an adjoining room with a stranger after Fulkerson had been arrested. He admitted the five-dollar bill was taken from his hand. Fulkerson testified, on cross-examination, that he paid for the phone bill. Counsel for the government showed him telephone receipts for the months during the time he said he was there, and he admitted that he paid them, and then a bill dated two months before the date he said he was there was showed him and he said he paid it, the date going unnoticed by him. He denied that he had anything to do with the liquor, when the agents testified that had his coat off, and his gun and handcuffs and various articles of clothing in the

room where the phone was located, which he said he paid for. There was no other phone in the building. The defendant Miller absconded, and the defendant Nulph was dismissed from the action.

The common law rule is that judges may comment upon the facts in a jury trial and may express their opinion in referring to the facts provided the jury is made to understand that they are not bound by such opinion. This has been the law in the federal court since 1790. It is entirely proper and in keeping with the theory of a jury trial, the true theory being that a judge and jury should cooperate or work together in the trial of a case. The judge's experience enables him to assist the jury by explaining the testimony and discussing the theories of both sides of the case with the jury, helping in every way to condense and clearly define the issues. His opinion, if any is expressed, is not, under the law, binding, and should not be, but is merely expressed to help them in coming to a correct conclusion.

In his instructions to the jury the court said:

"If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents, a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Vol-

stead law and the prohibition amendment, then you must conclude that way, because *it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it myself; I believe he knew what was in the bottle; but that must not control you; you must find the fact. And while I have the right to tell you what I think about the facts, you must not be controlled by what I think about them; you must weigh all the testimony and all the circumstances and determine what the truth is. If you have a reasonable doubt as to the facts then you should return a verdict of not guilty.*"

It is well understood that a judge should not in any way interfere with the conscientious judgment of a juryman or else the constitutional provision guaranteed a trial by jury would be abrogated.

A number of states in the union, approximately thirteen, desired to change the common law by statute and the tendency has been to restrict them in various ways in commenting upon the evidence, as in the case of *Wastel vs. Montana Union R. Company,* 17 Montana 21e, where the court held it was error under the Montana statutes for the judge to call to the attention of the jury three witnesses by name.

In the case of *Cook vs. State,* 11 Georgia 53, 57, Judge Nisbet says in commenting upon this change:

"It is to be feared in these days of reform, that the judges will be so strictly laced as to lose all power of vigorous and healthful action. I have but little fear of judicial power in Georgia so aggrandizing itself as to endanger any of the powers of other departments of the government, or to endanger the life and liberty of citizens, or to deprive the jury of their appropriate functions. The danger rather to be dreaded is making the judges men of straw, and thus stripping the courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law."

Mr. Justice Hughes in delivering an address before the New York State Bar Association in January, 1916, said:

"The other tendency of which I have spoken is occasionally observed in legislation which denies to judges the authority which would seem to be needed for the efficient discharge of judicial duty. Thus, in some jurisdictions the freedom of the judge in instructing the jury is very considerably curtailed in a manner which betrays a regrettable distrust. . . . . There can be no respect for the law without competent administration, and there can be no competent administration without adequate power. We shall never rise to our opportunities in this country and secure a proper discharge of the public business until we get over our dislike of experts; and the difficulties in the way of needed improvements in the administration of justice will not be overcome by

tying the hands of those most competent to deal with them."

An abstract brief presented before the house of representatives on behalf of the American Bar Association opposing house bill 9354, pep. 284, contained the following paragraph:

"Probably the reason why this proposed rule was introduced and followed in *many courts* in America was because of a certain excessive tenderness for the position of the defendant in a criminal case, which we are learning to find was *judicious and unwise.* We are getting to realize the importance of the ancient common-law rule that it is in the interest of the public that the guilty man should be punished. *Judex damnatur, com nocens absolvitur.*

"We have pointed out that a great deal of what discontent there is with the administration of justice, arises from the failure to convict or punish. Lynching is the protest of the natural man against what he thinks is a failure of justice. It is an evil thing, undoubtedly, but still we can understand how a community sometimes does feel. We do not justify it, but still it is a fact that we must consider. The way to prevent that is to insure on the one side reasonable protection to the criminal, but on the other to make him feel that 'there is a God in Israel,' that there is justice in the law, and if he is the guilty man he is going to be punished."

There are numerous cases in the federal decisions upon this point and it is only necessary to cite a

few to show that the instructions of the lower court was well within the bounds of the rule in the federal court.

In *Post vs. U. S.*, 135 Fed. 11, the court said:

"If it (testimony) be of a kind that clearly taxes the credulity of the judge he can say so or if he totally disbelieves it he may announce the fact, leaving the jury free to believe it or not."

It is plain to be seen that the testimony of Fulkerson would tax the credulity of any judge.

In the case of *Dillon vs. U. S.*, 279 Fed. 642, 2nd C. C. C. A., the lower court instructs the jury as follows:

"Now you have heard this case. The court's opinion is that the defendant is guilty of the crime charged. In a federal court the court may inform the jury what his opinion is of the guilt or innocence of the defendant, but I want you to understand the question of his guilt or innocence is solely for the jury to decide. It is not for the court. The court has no part in deciding the guilt or innocence of the defendant, but the court may, if it seems desirable, inform the jury of his opinion. Now, gentlemen, you will take this case. You have a duty, a public duty, to perform, to decide this case upon your oaths and your responsibility; to decide on your conscience; to decide whether or not this man had whiskey unlawfully in his possession."

The circuit court in commenting upon this instruction, said:

". . . . . But whatever the rule may be in the state courts it is a well established law *which this court has no right or inclination to depart from*, that in the federal court the trial judge is entitled to express his opinion upon the facts and the guilt or innocence of the accused provided the jury is given unequivocally to understand that it is not bound by the expressed opinion of the judge."

In *Horning vs. District of Columbia*, 254 U. S. 135, the supreme court sustains the following instruction:

"In conclusion I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors . . . . . of course, gentlemen of the jury, I cannot tell you in so many words to find the defendant guilty but what I say amounts to that."

In the case of *Savage vs. U. S.*, 270 Fed. 21, the court said that, as to four transactions which were named and described, there could not be any doubt that a fraud was perpetrated, but left it to the jury to find who had perpetrated the frauds. The court further said that it was of the opinion that the defendant was guilty on all counts but four and

refused to express an opinion as to the defendant's guilt as to those four. The court states repeatedly that this was a mere expression of its opinion, and that the jury were not bound by it and that it was the jury's duty to follow its own judgment, and that if the jury were of a contrary opinion, it was its duty to disregard the court's opinion.

In the case of *U. S. vs. Morse*, 255 Fed. 682, the lower court instructed the jury as follows:

"You are the sole judges of the facts of the case, and should determine the same after due consideration of all the evidence, in the light of attending circumstances, and the reasonableness and fair inferences to be drawn from the testimony, and in so doing you should act upon your own independent judgment, uninfluenced by what others, including the court, may think or say. *But I would be derelict in my duty if I did not say to you that, from my standpoint and viewpoint, this testimony irresistibly and irrefutably points to the absolute guilt of these defendant.*"

And the circuit court sustained this instruction.

In the case of *Beyer vs. U. S.*, C. C. A. 9th C., 251 Fed. 39, this court sustained, which goes no further than the present instruction by Judge Neterer.

Shea vs. U. S., 251 U. S. 445.

Sylvia vs. U. S., 264 Fed. 593.

Candle vs. U. S., 278 Fed. 710.

Balsom vs. U. S., 259 Fed. 779.

Perkins vs. U. S., 228 Fed. 408.

Allis vs. U. S., 155 U. S. 117, 123.

Lovejoy vs. U. S., 128 U. S. 171.

Soranners vs. U. S., 142 U. S. 148, 155.

Respectfully submitted,

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